

Bypassing Bias: How Law Reviews Circumvent Favoritism

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Could peer-reviewed humanities journals benefit by having student editors, as is the practice for law reviews? Are student editors valuable because they are less likely than peer reviewers to be biased against certain contributors and viewpoints? I begin with a qualifier: What I am about to say is based on research, anecdotes, and experience rather than empirical data that I have compiled on my own. I do not know for sure whether student editors are more or less biased than professional academics, and I hesitate to displace concerns for expertise and experience with anxiety about editorial bias. There may be situations in which students can make meaningful contributions to reviewing and editing scholarship—and to scholarship itself—but to establish them as scholarly peers is, I think, a distortion and probably a disservice to them and their fields.

Student editors of and contributors to law reviews may seem to be the notable exception, but legal scholarship is different from humanities scholarship in ways I address below, and law reviews suffer from biases similar to those endemic to peer-reviewed journals. Nevertheless, law review submission and editing probably have less systemic bias than peer-reviewed journals, but not because students edit them. Rather, law review submission and editing make it more difficult for bias to occur. The system, not the students, facilitates editorial neutrality.

There are several factors about this system that preclude bias. Because editors are students in their second and third year of law school, editorial

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turnover is rapid. Every year a law review has a new editorial team composed of students with varied interests and priorities. What interested a journal last year will be different this year. Therefore, law reviews are not likely to have uniform, long-lasting standards for what and whom to publish—at least not with regard to ideology, political persuasion, or worldview.

Law review editors are chosen based on grades and a write-on competition, not because they are likeminded or pursuing similar interests. Therefore, law reviews are bound to have more ideological and topical diversity than peer-reviewed journals, which are premised upon mutual interest, and many of which betray the academic side of cronyism: friends and friends of friends become editors of peer-reviewed journals notwithstanding a record of scholarship. The composition of law review editorial boards is, by contrast, based upon merit determined through heated competition.

Once on board, law review student editors continue to compete with one another, seeking higher ranks within editorial hierarchies.¹ Being the editor-in-chief or senior articles editor improves one's résumé and looks better to potential employers than being, say, the notes editor. Voting or evaluations of academic performance establish the hierarchies. Moreover, each year only a few student articles are published, so editors are competing with one another to secure that special place for their writing.² Finally, student editors usually receive grades for their performance on law review. The result of all of this competition is that law review editors are less able than peer reviewers to facilitate ideological uniformity or to become complacent in their duties—and law reviews will exhibit greater ideological diversity and publish more quickly and efficiently than peer-reviewed journals.

Because of the ample funding available to law schools, scores of specialized journals have proliferated to rival the more traditional law reviews. Many specialized law reviews were designed to compensate for alleged bias. There are journals devoted to women's issues, racial issues, law and literature, law and society, critical legal studies, and so on. There are also journals aimed principally at conservatives: *Harvard*

¹I consider editor selection flawed for some of the reasons Christian C. Day describes in "The Case for Professionally-Edited Law Reviews," *Ohio Northern University Law Review* 33 (2007): 570–74.

²How this competition works differs from journal to journal. In some cases, the students select which student articles to publish based on an elaborate voting process supposedly tied to blind review and authorial anonymity. In other cases, faculty decide.

Journal of Law and Public Policy, *Texas Review of Law & Politics*, and *Georgetown Journal of Law & Public Policy*, to name three. Specialized journals give students and scholars a forum for the likeminded. On the other hand, such journals call for specialization, which students are unlikely to possess.³

For these reasons, I believe that bias is less prevalent among law reviews than among peer-reviewed journals. Part of the difficulty in determining bias, however, is that data collection depends upon the compliance of law review editors, who receive and weed through thousands of submissions per submission period and have neither the time nor the energy to compile and report data about each submission. Moreover, these editors, perhaps in preparation for likely careers as attorneys, are often required to maintain strict confidentiality regarding authors and submissions, thereby making “outside” studies of law reviews extremely difficult to conduct.

And then there is the problem of writing about bias at all: everyone can find bias in the system. I suspect that institutionalized bias against conservative legal scholars exists, but nonconservatives also complain about bias. Minna J. Kotkin has suggested that law reviews are biased against female submitters.⁴ Rachel J. Anderson has suggested that law reviews are biased against “dissent scholarship,” which, she says, includes “civil rights scholarship, critical legal studies, critical race theory, feminist theory, public choice theory, queer theory, various ‘law ands’ scholarship that employs quantitative or humanistic methodologies, and other scholarship that, at one point in time or another, is not aligned with ideologies or methodologies that the reader values or considers legitimate.”⁵ Finally, Jordan Leibman and James White discovered bias favoring authors with credentials, publication records, or experience.⁶

³“Many scholars feel that student editors of law review articles, while they were perhaps once competent to evaluate the merit of scholarly articles owing to the much narrower range of topics, have for the last few decades had great difficulty grappling with non doctrinal scholarship (that is, scholarship dealing with the intersection of law and other disciplines). The authors of law journal articles now increasingly draw from areas such as economics, gender studies, literary theory, sociology, mathematics, philosophy, political theory, and so on, making the enterprise much too difficult for a group of generally young people, who are not only not specialists, but have barely entered the field of law.” Nancy McCormack, “Peer Review and Legal Publishing: What Law Librarians Need to Know about Open, Single-Blind, and Double-Blind Reviewing,” *Law Library Journal* 101, no. 1 (Winter 2009): 61–62.

⁴Minna J. Kotkin, “Of Authorship and Audacity: An Empirical Study of Gender Disparity and Privilege in the ‘Top Ten’ Law Reviews,” *Women’s Rights Law Reporter* 31, no. 4 (2010): 385–446.

⁵Rachel J. Anderson, “From Imperial Scholar to Imperial Student: Minimizing Bias in Article Evaluation by Law Reviews,” *Hastings Women’s Law Journal* 20, no. 2 (2009): 206.

⁶Jordan H. Leibman and James P. White, “How the Student-Edited Law Journals Make Their Publication Decisions,” *Journal of Legal Education* 39, no. 3 (September 1989): 396, 404.

Law student bias seems, from my perspective, more likely to be weighted toward credentials and reputation than toward political persuasion.⁷ An established professor with an endowed chair is therefore more likely to receive a publication offer from a law review than an unknown, young, or adjunct professor; and the name recognition of an author—regardless of personal politics—is more likely to guarantee that author a publication slot in a law review. One downside to this is that student editors will accept half-written or ill-formed articles simply because the author is, for want of a better word, renowned. It is common in these situations for students then to ghostwrite vast portions of the article for the author. Another more obvious downside is that professors from select institutions and with certain reputations will be published over authors who have submitted better scholarship. This is the primary reason why I advocate for a hybrid law review/peer review approach to editing.⁸

I've mentioned that legal scholarship differs from humanities scholarship. What makes it different is its attention to doctrinal matters, i.e., to the application of law to facts or the clarifying of legal principles and canons. After their first year of law school, students are equipped to study these sorts of matters. They are not unlike lawyers who approach a legal issue for the first time and must learn to analyze the applicable law in light of the given facts. Although the breadth and scope of legal scholarship have changed to reduce the amount of doctrinal scholarship produced and to incorporate interdisciplinary studies, doctrinal scholarship remains the traditional standard and the conventional norm.

Law students have the facility to edit doctrinal scholarship, but not to edit interdisciplinary articles.⁹ This point is not necessarily to advance my argument about bias being less inherent in law review editing; rather, it is to

⁷Many others share this view: "It appears to be generally assumed that, to a significant degree, Articles Editors use an author's credentials as a proxy for the quality of her scholarship." Jason P. Nance and Dylan J. Steinberg, "The Law Review Article Selection Process: Results from a National Study," *Albany Law Review* 71, no. 2 (2008): 571.

⁸See my Spring 2013 *Academic Questions* article, "The Law Review Approach: What the Humanities Can Learn." I am not alone on this score. Day suggests that "this bias can be defeated by blind submissions or having faculty members read the abstracts and articles of blind-submitted articles where the quality is unknown. The names and other identifying information should be obscured, which is common in other disciplines. This is easy to do with electronic submissions. It should be the rule in law reviews, at least at the initial stage of article selection." "Case for Law Reviews," 577.

⁹Hence Richard Posner's suggestion that law reviews "should give serious consideration to having every plausible submission of a non-doctrinal piece refereed anonymously by one or preferably two scholars who specialize in the field to which the submission purports to contribute." "The Future of the Student-Edited Law Review," *Stanford Law Review* 47 (Summer 1995): 1136.

circle back to my initial position that inexperienced and inexpert students should not be empowered to make major editorial decisions or to control the editing. As I have suggested, student editors are biased, just as professional peer reviewers are biased—the problem is that students are less prepared and qualified to make sound editorial judgments. If what is needed is an editorial system that diminishes bias, then student editors are not the solution. Law review editing, however, provides a clarifying model for offsetting widespread bias.

It would be difficult if not impossible to implement law review editing among humanities peer-reviewed journals for the disappointing reason that law reviews enjoy ample funding from institutions, alumni, and the legal profession whereas humanities journals struggle to budget and fight for funding. Therefore, I will not venture to say that peer-reviewed journals *ought* to do something about their bias problems by mimicking law review editing. Such a solution would not be practical. But by pointing out the benefits of law review editing—i.e., the result of less bias due to such factors as competition and turnover in editorial positions—I hope that more creative minds than mine will discover ways to reform peer-reviewed journals to minimize bias.